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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/725,251	12/01/2003	Robert Jason Vickers	P146	1935
27752 7590 08/15/2007 THE PROCTER & GAMBLE COMPANY INTELLECTUAL PROPERTY DIVISION - WEST BLDG. WINTON HILL BUSINESS CENTER - BOX 412 6250 CENTER HILL AVENUE CINCINNATI, OH 45224				
			EXAMINER ISSAC, ROY P	
			ART UNIT 1623	PAPER NUMBER
			MAIL DATE 08/15/2007	DELIVERY MODE PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/725,251

Applicant(s)

VICKERS ET AL.

Examiner

Roy P. Issac

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-20 is/are pending in the application.
- 4a) Of the above claim(s) 9-20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-8 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 4/21/04; 5/18/05.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_.

### **DETAILED ACTION**

This application does not claim priority to any foreign or domestic applications.

#### ***Election/Restrictions***

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-8, drawn to a composition comprising oligofructoside, classified in class 424, subclass 725; 536/1.11.
- II. Claims 9-20, drawn to a method comprising administering composition comprising oligofructose, classified in class 424, subclass 725; 536/1.11.

The inventions are distinct, each from the other because of the following reasons:

Inventions I and II are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product. See MPEP § 806.05(h). In the instant case the method of improving gastrointestinal health of a companion animal or improving fecal odor of feces of a companion animal can be achieved by many of the well known compositions used for improving gastrointestinal health of companion animals, including antacids, non-steroidal anti inflammatory drugs.

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Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction is not required because the inventions require a different field of search (see MPEP § 808.02), restriction for examination purposes as indicated is proper. The composition claims herein are directed to a large class of compounds and the search for a composition comprising oligofructosides would not be coextensive with a method of administering them to companion animals.

Because these inventions are independent or distinct for the reasons given above and there would be a serious burden on the examiner if restriction is not required because the inventions have acquired a separate status in the art due to their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

During a telephone conversation with Sarah Dressel on 7/25/2007 a provisional election was made without traverse to prosecute the invention of Group I, claims 1-8. Affirmation of this election must be made by applicant in replying to this Office action. Claims 9-20 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship

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must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

The examiner has required restriction between product and process claims. Where applicant elects claims directed to the product, and the product claims are subsequently found allowable, withdrawn process claims that depend from or otherwise require all the limitations of the allowable product claim will be considered for rejoinder. All claims directed to a nonelected process invention must require all the limitations of an allowable product claim for that process invention to be rejoined.

In the event of rejoinder, the requirement for restriction between the product claims and the rejoined process claims will be withdrawn, and the rejoined process claims will be fully examined for patentability in accordance with 37 CFR 1.104. Thus, to be allowable, the rejoined claims must meet all criteria for patentability including the requirements of 35 U.S.C. 101, 102, 103 and 112. Until all claims to the elected product are found allowable, an otherwise proper restriction requirement between product claims and process claims may be maintained. Withdrawn process claims that are not commensurate in scope with an allowable product claim will not be rejoined. See MPEP § 821.04(b).

Additionally, in order to retain the right to rejoinder in accordance with the above policy, applicant is advised that the process claims should be amended during prosecution to require the limitations of the product claims. **Failure to do so may result in a loss of the right to rejoinder.** Further, note that the prohibition against double patenting rejections of 35 U.S.C. 121 does not apply where the

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restriction requirement is withdrawn by the examiner before the patent issues.

See MPEP § 804.01.

### ***Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-8 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 18-31 of copending Application No. 10/724,839. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant application is directed to companion animal compositions comprising oligofructosaccharides selected from the group consisting of 1-kestose, nystose, and 1F-beta-fructofuranosylnystose, and the '839 application is directed to a kit

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comprising a companion animal composition comprising fructooligosaccharides including 1-kestose, nystose, and 1F beta-fructofuranosylnystose. One of ordinary skill in the art would have been motivated to prepare a kit comprising the same composition because the preparation of a kit comprising a health promoting composition is considered well in the competence level of an ordinary skilled artisan and well within conventional skills in pharmaceutical science, involving merely routine skill in the art.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claims 1-8 are provisionally rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-36 of copending Application No. 10/725,248. Although the conflicting claims are not identical, they are not patentably distinct from each other because the instant application is directed to a companion animal composition comprising oligofructose including 1-kestose, nystose, and 1F beta-fructofuranosylnystose, and the co-pending application is directed to compositions comprising oligofurctose including 1-kestose, nystose, and 1F beta-fructofuranosylnystose and kits comprising the same. See discussion above regarding kits. As such, claims herein are deemed anticipated by the co-pending application.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1-8 are rejected under 35 U.S.C. 102(b) as being anticipated by Howard et. al. (Nutrition Research, 2000, 20(10), 1473-1484; PTO-892).

Howard et. al. discloses feeding dogs that contain fructooligosaccharides (FOS). (Abstract). The FOS used was Nutraflora at 1.5%. (Table 1, Page 1474, and Page 1474, last paragraph). Note that Nutraflora is described in the instant specification as having 34% 1-kestose, 55% nystose and 10% 1F-beta-fructofuranosylnystose. (Specification, Page 4, second paragraph). Note that the range claimed herein "about 0.2%" and "about 0.18%" is considered to included 1.5%. Howard describes that the incorporation of fermentable fiber into diet has several beneficial effects including, reducing colonic histopathologies, beneficially altering the intestinal microflora and reducing blood urea and renal N excretion. (Page 1473, introduction). Howard discloses that dry matter intake was reduced with FOS containing diets. These effects are expected to improve the physical activity performance of a companion animal.



Claims 1-8 are rejected under 35 U.S.C. 102(b) as being anticipated by Reinhart et. al. (U.S. Patent No. 5,776,524; PTO-892).

Reinhart et. al. discloses the use of 0.2 to 1.5% weight percent of fructooligosaccharide in pet food. (Column 1, lines 50-55). Reinhart et. al. further discloses Nutraflora as a commercially available fructooligosaccharide. (Column 2, lines 35-40). Note that Nutraflora is described in the instant specification as having 34% 1-kestose, 55% nystose and 10% 1F-beta-fructofuranosylnystose. (Specification, Page 4, second paragraph). Reinhart et. al. further exemplify the use of 1.0% fructooligosaccharide with other fiber sources such as rice, corn, and beet pulp. (Column 3, Table 1). Note that "about 0.2%" and "about 0.18%" are deemed to include concentrations 0.2% and 1.0% disclosed in Reinhart et al. As such claims herein are deemed anticipated by Reinhart et. al.

Claims 1-3 and 5-6 are rejected under 35 U.S.C. 102(b) as being anticipated by Houdijk et. al. (Livestock production science, 73, 2002, 175-184; PTO-892).

Houdijk et. al. discloses the use of 7.5-15g/kg (0.75-1.5%) fructooligosaccharides, Raftilose P95 in feeds for pigs. (Abstract). Note that the range discloses 0.75% to 1.5% is considered within the "about 0.18%" claimed herein. Houdijk further discloses a sample composition as sample diet. (Table 1). Corn and soy oil, both considered sources of fiber are included in the sample diet. Additional protein sources are disclosed such as casein, fish meal, and

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animal meal. Note that the recitation "companion animal composition" in the preamble is considered an intended use of the composition and is not considered to be further limiting.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Houdijk et. al. (Livestock production science, 73, 2002, 175-184; PTO-892). In view of Howard et. al. (Nutrition Research, 2000, 20(10), 1473-1484; PTO-892).

Houdijk et. al. discloses the use of 7.5-15g/kg (0.75-1.5%) fructooligosaccharides, Raftilose P95 in feeds for pigs. (Abstract). Note that the range discloses 0.75% to 1.5% is considered within the "about 0.18%" claimed herein. Houdijk et. al. notes that fructooligosaccharides are considered as prebiotics and are used as additives in animal feedstuffs. Houdijk further discloses a sample composition as sample diet. (Table 1).

Houdijk et. al. does not expressly disclose a protein source selected from beef, pork, lamp, poultry, fish, or vegetable and mixtures thereof.

Howard et. al. discloses feeding dogs that contain fructooligosaccharides (FOS). (Abstract). The FOS used was Nutraflora at 1.5%. (Table 1, Page 1474, and Page 1474, last paragraph). Note that Nutraflora is described in the instant specification as having 34% 1-kestose, 55% nystose and 10% 1F-beta-fructofuranosylnystose. (Specification, Page 4, second paragraph). Howard describes that the incorporation of fermentable fiber into diet has several beneficial effects including, reducing colonic histopathologies, beneficially altering the intestinal microflora and reducing blood urea and renal N excretion. (Page 1473, introduction). Howard discloses that dry matter intake was reduced with FOS containing diets. These effects are expected to improve the physical activity performance of a companion animal.

It would have been obvious to one of ordinary skill in the art at the time the invention was made to prepare a companion animal composition comprising about 0.2% short chain oligofructose with additional fiber source as well as protein source such as poultry or chicken liver meal. It is considered well within the basic skills of one of ordinary skill in the art to substitute casein, fish meal or animal meal with beef, pork, lamp, poultry, fish or vegetable as a protein source in a companion animal composition. Furthermore, Houdijk et. al. discloses the inclusion of protein sources in animal feed composition and Howard discloses several protein sources in similar animal feed composition.

One of ordinary skill in the art would have reasonably expected that the use of a protein source such as poultry or chicken liver would have substantially similar or better beneficial effects.

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Thus the claimed invention as a whole is clearly prima facie obvious over the combined teachings of the prior art.

No claim is allowed.


Any inquiry concerning this communication or earlier communications from the examiner should be directed to Roy P. Issac whose telephone number is 571-272-2674. The examiner can normally be reached on 9:00-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Shaojia Anna Jiang can be reached on 571-272-0627. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

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Roy P. Issac  
Patent Examiner  
Art Unit 1623

 8/10/07  
S. Anna Jiang, Ph.D.  
Supervisory Patent Examiner  
Art Unit 1623